UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

HLS FASHIONS, INC. and
JEN CHU APPAREL, INC.
A Single Integrated Enterprise

and **Case No. 2–CA–33415**

ZENG GUAN LIU, An Individual

Geoffrey E. Dunham, Esq. And Joane Si lan Wong, Esq.,
for the General Counsel.
***John J. Courtney, Esq.,* for the Respondent.**

DECISION

Statement of the Case

Michael A. Marcionese, Administrative Law Judge. I heard this case in New York, New York on December 18-19, 2001, and January 24-25 and March 19, 2002. Zeng Guan Liu ("Liu" or the Charging Party), an individual, filed the charge on November 14, 2000[1] and the complaint was issued on May 30, 2001. As amended at the hearing, the complaint alleges that HLS Fashions, Inc. ("HLS") and Jen Chu Apparel, Inc. ("Jen Chu"), are a single integrated enterprise and a single employer within the meaning of the Act. The complaint alleges further that HLS and Jen Chu, collectively "the Respondent", has violated Section 8(a)(1) of the Act since early June by failing and refusing to hire, or consider for hire, five named individuals, including the Charging Party, because they joined in filing a federal lawsuit against the Respondent for alleged violations of minimum wage and overtime laws. The complaint alleges further that the Respondent has violated Section 8(a)(1) and (3) of the Act since August 30 by failing and refusing to hire, or consider for hire, fifteen named individuals, including the five who filed the lawsuit, because these fifteen employees concertedly signed a letter seeking the assistance of UNITE, Local 89-22-1 ("the Union"), in asking the Respondent to recall them to work. Respondent HLS filed an answer to the complaint on November 27, 2001 denying that HLS and Jen Chu are a single employer and denying the unfair labor practice allegations.[2] No affirmative defenses were pleaded.

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[1] All dates are in 2000 unless otherwise indicated.

[2] Counsel for Respondent HLS stated at the hearing that Jen Chu is no longer in business and that the corporation has been dissolved.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the Respondent's closing argument at the hearing and the brief filed by the General Counsel, I make the following

Findings of Fact

I. Jurisdiction

HLS and Jen Chu, New York corporations, were at all relevant times engaged in the business of manufacturing clothing at adjacent facilities located on the fifth floor of 519 Eighth Avenue in New York, New York. Each entity annually sold products valued in excess of $50,000 to other entities, such as Donna Karan International, Inc., d/b/a The Donna Karan Company a/k/a DKNY and Tahari, located within the State of New York that are directly engaged in interstate commerce. At the hearing, Respondent HLS stipulated that the operations of HLS and Jen Chu individually were within the Board's jurisdiction. Based on this stipulation and the evidence in the record, I find that HLS and Jen Chu, individually and collectively, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the parties' stipulation at the hearing, I find further that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Single Employer Issue*

Calvin Chen testified that he was the sole owner and officer of Jen Chu prior to its dissolution. He testified that his wife, Hok Lung Yeong, also referred to by witnesses as Winnie or the boss' wife, was the sole owner and officer of HLS, a corporation created in June or July 1998. There is no dispute that HLS was created after the failure of another corporation, referred to in the record as Jen Jen, which had operated out of the same facility now occupied by HLS. According to Calvin Chen, he and a partner, Matt Giordano, were the owners of Jen Jen.[3] Giordano was its sole officer. Jen Jen, which went out of business around the time that Winnie Yeong started HLS, had been in operation for only six months. There is no dispute that all three corporations were in the same business, i.e. contractors in the garment industry assembly clothing for other enterprises such as DKNY. In fact, DKNY was a customer of all three entities.[4]

Calvin Chen admitted that he assisted his wife in getting her corporation started. He loaned her $10,000 from his personal funds, subcontracted some of Jen Chu's work to HLS and, for several months, paid HLS' rent on the space previously occupied by Jen Jen.[5] The money Winnie Yeong borrowed from her husband was apparently used to acquire the equipment previously owned by Jen Jen. Although Calvin Chen testified that his wife ultimately re-paid the loan, he conceded there was no written record to document either the loan or its repayment and that he did not collect interest on the funds borrowed. There is no dispute that

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[3] Chen testified that he owned 30% of Jen Jen's shares and Giordano held the rest.

[4] Calvin Chen testified that DKNY accounted for about 80% of Jen Chu's work with the remainder being work for a company called Tahari. He testified that only about 20% of HLS' work was for DKNY and that HLS primary customary was Tahari. According to witnesses, Jen Chu was a high end manufacturer while HLS worked on moderately priced garments.

[5] In one of several discrepancies in their testimony, Winnie Yeong denied that her husband or his corporation paid the rent for HLS at any time.

before she started her own company, Winnie Yeong worked with her husband at Jen Chu. According to Winnie Yeong, because of her experience making garments, she was in charge of quality control, making sure that the finished product met the high standards set by Jen Chu's customers. It is undisputed that Calvin Chen, although experienced in running a business, knows very little about the technical aspects of making garments.

Calvin Chen and Winnie Yeong acknowledged that, during the time that the two companies operated next door to one another, they regularly, if not frequently, assisted one another in meeting production demands. There is no dispute that HLS would use some machines owned by Jen Chu that it did not have and vice versa. Sometimes the machine itself would be moved from one factory to the other. Other times, the garments would be brought to the factory next door to be worked on. Mr. And Mrs. Chen acknowledged further that each company would sometimes use the employees of the other to work on their respective products. There is no record that the two companies ever reimbursed one another for this interchange. It is undisputed that, regardless of which company's product they were working on, the employees of Jen Chu were paid by Jen Chu and the employees of HLS were paid by HLS. There is also evidence in the record that the employees of both companies shared the same space, for about a week, during a period when the Jen Chu factory was undergoing renovations.

Although Calvin Chen and Winnie Yeong denied that Winnie Yeong supervised Jen Chu's employees after HLS began operations, witnesses who testified for the General Counsel who previously worked for Jen Chu testified that Winnie Yeong's involvement in the management of Jen Chu did not change significantly after she started her own company.[6] These witnesses also testified that Sau Chun Wong, known to the employees as Jessie, who was HLS' floor lady and admitted supervisor, would oversee any work they did for HLS. While Jessie, testifying for the Respondent, denied ever supervising any of Jen Chu's employees, she acknowledged bringing work from HLS to Jen Chu for Jen Chu employees to perform and she acknowledged sometimes seeking the assistance of Jen Chu's floor lady, Yuk to Wong Mui, referred to as Mrs. Moi or Mrs. Mei in the record, if she had problems with a sample. Calvin Chen reluctantly acknowledged that Jessie would occasionally come to him with concerns related to HLS employees, contradicting Jessie's denial that she interacted with Calvin Chen in this way.

Jen Chu and HLS were both members of the same employer association and, as members, parties to a collective-bargaining agreement with the Union. Calvin Chen admitted that he sometimes assisted his wife with Union matters because he was more familiar with the contract. Jen Chu and HLS used the same payroll company, attorney and accountant. Although they had separate insurance policies, both companies used the same insurance agent.

The record establishes that Jen Chu went out of business at the end of May. Jen Chu 's employee complement had decreased from a high of 65 during the busy season, early in the year, to about 45 employees in April and to less than 15 when it ceased operations. Several former Jen Chu employees who testified for the General Counsel described seeing work being moved from the Jen Chu factory to HLS' factory within a few weeks of the closing. There is no dispute that, when Jen Chu closed, two of its machines were transferred to HLS. Winnie Yeong admitted at the hearing that HLS had not yet paid Jen Chu for these machines. Calvin Chen also went to work for his wife after the demise of Jen Chu. Although he initially testified that he

[6] The employee witnesses referred to the factory next door as Jen Jen, even for periods after HLS came into existence. Apparently, this is the only name by which they knew that company.

became the General Manager of HLS, in later testimony he claimed that he held no official position but merely helped his wife run the business. Several key Jen Chu employees whose supervisory status is in dispute also went to work for HLS at the same time as Calvin Chen.[7] In addition, HLS payroll records in evidence reveal that a number of rank-and-file Jen Chu employees were hired by HLS shortly after Jen Chu went out of business.

In determining whether two nominally separate employing entities constitute a single employer, the Board looks to four factors, i.e. common ownership, common management, interrelation of operations, and centralized control of labor relations. No single factor is controlling and not all need be present. Rather, single employer status depends on all the circumstances and is characterized by the absence of the arms-length relationship found between unintegrated entities. *Radio Technicians Local 1264 v. Broadcast Service of Mobile,* 380 U.S. 255, 256 (1965); *Dow Chemical Co.,* 326 NLRB 288 (1998) and cases cited therein. See also *Navigator Communications Systems,* 331 NLRB No. 142 (2001); *Denart Coal Co.,* 315 NLRB 850 (1994).

The evidence summarized above clearly establishes that the Respondent meets the Board's test for a single employer. Although Calvin Chen owned Jen Chu and his wife owned HLS, the Board has frequently treated ownership of ostensibly separate companies by members of the same family as common ownership. *Truck & Dock Services,* 272 NLRB 592, fn. 2 (1984). Such a conclusion would be particularly appropriate here where it is apparent that the money needed by Winnie Yeong to start her business came from her husband and from their joint assets. It is also apparent that both companies were managed jointly by Calvin Chen and his wife, with Calvin Chen handling the business side and Winnie Yeong handling production matters. I did not find credible the testimony of Calvin Chen and Winnie Yeong, which endeavored to show a degree of separation between the two companies that did not in fact exist. As previously noted, the Chens did not always corroborate one another. Calvin Chen also contradicted affidavits he gave to the General Counsel during the investigation of this case. At several points in his testimony, he was forced to retract or revise testimony after being shown his prior affidavit. The Respondent's centralized control of labor relations is evidenced by the fact that both companies were parties to the same collective-bargaining agreement, having delegated bargaining authority to the same employer association, which agreement established identical terms and conditions for the employees of both entities. Although Calvin Chen testified that his wife joined the association when she formed her company, he acknowledged that he was more familiar with the terms of the agreement. It is obvious that he made the decision that his wife's company should be part of the Union in order to facilitate obtaining work from unionized manufacturers in the garment industry.

Perhaps the strongest evidence establishing the existence of a single employer is the degree of integration between the two companies. HLS would not have been able to commence operations if it had not been able to sublet the space formerly occupied by Jen Jen, a company partly owned by Calvin Chen, and to acquire the machinery owned by Jen Jen. It was Calvin Chen who facilitated this transaction by advancing money, interest free, with no note to evidence any indebtedness on the part of HLS to him or his company. Even after HLS was in operation, Jen Chu permitted HLS to use its machines and employees to meet its production requirements without any reimbursement. When Jen Chu ceased operations, HLS acquired some of its machines free of charge and transferred Jen Chu's key employees, including Calvin

[7] Pui Ling Li, also known as Margaret, Yao Tang Li, also known as Ah Tang and Min Hua Jin are the other employees. The General Counsel has alleged that these three individuals were statutory supervisors and agents of the Respondent.

Chen and Margaret Ma to its payroll. The totality of circumstances revealed in the record demonstrates the absence of any "arm's length relationship" between these two entities. Accordingly, I find that Jen Chu and HLS constituted at all material times a single employer within the meaning of the Act. *Denart Coal Co.,* supra; *DMR Corp.,* 258 NLRB 1063, 1068 (1981).

B. *Supervisory/Agency Status*

The Respondent stipulated at the hearing that Calvin Chen, Winnie Yeong and Mrs. Moi were, at all material times, supervisors and agents of the Respondent within the meaning of the Act. The Respondent stipulated further that Sau Chun Wong, a/k/a "Jessie", is a statutory supervisor and agent of HLS. Because I have found that HLS and Jen Chu are a single employer, I find that Jessie was also an agent of Jen Chu at all material times. The credible testimony of witnesses such as Miao Qiong Chen and Lai Yee Chan also supports a finding that Jessie possessed and exercised supervisory authority over the employees of Jen Chu when they worked on HLS garments. The status of three individuals remained in dispute at the close of the hearing, i.e., Margaret, the "secretary" who worked in Jen Chu's office and admittedly maintained Jen Chu's payroll records and distributed employees' paychecks; Ah Tang, the presser; and Min Hua, who was identified as the lead hand sewer for Jen Chu.

Several former Jen Chu employees testified that Margaret was more than a secretary or payroll clerk. These employees testified that she would distribute work to the employees, would monitor their work and would approve requests for time off. For example, one former employee, Lai Yee Chan, testified that Margaret watched the employees on a TV monitor. She also testified that, on one occasion, Margaret sent her home when there was no more work to do. Another witness, Hui Qing Liu, testified that Margaret would occasionally tell her to go next door, i.e. to HLS, to work when work was slow at Jen Chu. Yi Qing Chen, who was Jen Chu's "distributor" who transported work within the factory, testified that Margaret would instruct him how to distribute the work. Several witnesses identified Margaret as the person in charge if neither Calvin Chen nor his wife were around. Liu, the Charging Party, testified that Calvin Chen made an announcement on one occasion that Margaret was in charge when he was absent. None of this testimony was denied by any witness for the Respondent.

Section 2(11) of the Act defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment." The Board has held that the possession of any one of these statutory indicia of supervisory authority is sufficient to confer supervisory status on an individual. See, e.g., *Spentonbush/Red Star Cos.,* 319 NLRB 988 (1995); *Chicago Metallic Corp.,* 273 NLRB 1677, 1689 (1985), affd. in relevant part 794 F.2d 527 (9th Cir. 1986). The burden of proof lies with the party asserting supervisory status. *Freeman Decorating Co.,* 330 NLRB 1143 (2000); *Youville Health Care Center,* 326 NLRB 495 (1998).

The General Counsel relies on Margaret's apparent authority to assign work and approve time off, in addition to her role as the person "in charge" when the Chens were absent from the factory. The testimony of the General Counsel's witnesses, however, does not clearly demonstrate that Margaret exercised any independent judgment in exercising this authority. Thus, there is no evidence in the record to show how Margaret determined the assignment of work. Because the employees had specific job classifications that defined their jobs, i.e., sewing machine operator, marrower, sample maker, presser, hand sewer, etc., the assignment of work

may have been pre-determined by what needed to be done on a particular garment. In terms of approving time off, it appears that employees would routinely be granted time off, as long as it did not interfere with production. Finally, the record is devoid of any evidence regarding what Margaret did when she was "in charge", or even regarding how often this occurred and for what length of time. The sporadic possession of supervisory authority for brief periods when an acknowledged supervisor is absent has been held an insufficient basis to confer supervisory status within the meaning of the Act. *Aladdin Hotel,* 270 NLRB 838, 840 (1984); *Complete Auto Transport,* 214 NLRB 425, 426 (1974). Accordingly, I find that the General Counsel has not met his burden of proving that Pui Ling Li, a/k/a Margaret, was a statutory supervisor of the Respondent.

Although the evidence is insufficient to establish that Margaret was a supervisor within the meaning of the Act, there is sufficient evidence in the record to support a finding that she was an agent of the Respondent under Board law. The apparent authority that the Respondent conferred upon her to act on its behalf with respect to issues such as time off, and her role in the payroll process and as the person "in charge" when the Chens were gone, is sufficient to satisfy the Board's test of agency. The Board has long held that, where an employer places an individual in a position where employees could reasonably believe that the individual spoke on behalf of management, the individual is an agent of the employer and any statements and actions of the individual within the scope of their apparent authority are attributable to the employer. *Hausner Hard Chrome of Ky., Inc.,* 326 NLRB 426, 428 (1998). Accordingly, I find that Margaret was, at all material times, an agent of the Respondent.

The General Counsel contends that Yau Tang Li, or Ah Tang, was in charge of the press department. The evidence regarding his duties and authority is sparse. Although several employees testified that Tang was in charge of the pressers' area, no one explained what this meant in terms of his authority. The only witness to give any indication that Tang possessed supervisory authority was Sheng Jiang Chen, a presser himself, who testified that Tang would tell him at the end of each day what time to come to work the next day. Chen also testified that Tang granted his request to take a day off to move, in April, and that Tang brings him work. As with Margaret, the record is devoid of any evidence indicating that the exercise of this "authority" required any independent judgment. For example, although Tang told Sheng Chen what time to come to work, Sheng Chen acknowledged that he started work at the same time most days. The only other evidence relied upon by the General Counsel to prove Tang's supervisory status is the fact that his employee number is in the 7000s, which Calvin Chen testified were the numbers assigned to supervisors and office personnel.

I find that the General Counsel has not offered sufficient evidence to warrant a finding that Yau Tang Li, or Ah Tang, was a supervisor within the meaning of the Act. Whatever authority he possessed over other employees appears to be routine in nature, not requiring the exercise of any independent judgment. Although his employee number indicates that the Respondent classified him as a "supervisor", this is only a secondary indicia of supervisory status. It is the authority and the degree to which its exercise requires independent judgment, rather than the employee's title, which determines true supervisory status within the meaning of the Act. *John N. Hansen Co.,* 293 NLRB 63, 64 (1989). However, as with Margaret, it appears that the Respondent invested Tang with at least the apparent authority to act in its behalf, by serving as a conduit between management and the employees, thereby placing him in a position which would lead employees such as Sheng Jiang Chen to reasonably believe that Tang was speaking or acting for management. Accordingly, I find that Yao Tang Li was an agent of the Respondent within the meaning of the Act.

The record contains very little evidence regarding the status of Min Hua Jin and no evidence indicating that she possessed or exercised any of the statutory indicia of supervisory authority. The General Counsel has essentially conceded this point by arguing in its brief only that she was an agent of the Respondent. Hui Qing Liu, who worked for Jen Chu in the hand-sewing or finishing department, identified Min Hua as the person in charge of her department. According to Hui Qing Liu, Min Hua taught the other hand sewers how to sew on buttons and do other finish work. When Hui Qing Liu finished her work, she would ask Min Hua for more. If she needed time off, she would ask Min Hua. However, according to Hui Qing Liu, Min Hua would typically tell her to see Margaret if she wanted time off. Min Hua's employee number was in the 5000s, which Calvin Chen testified were the numbers assigned to employees in the hand-finishing department. Jen Chu's payroll report for one of the last pay periods before it closed shows 10 employees with employee numbers in the 5000s, including Min Hua Jin.

As the General Counsel apparently now recognizes, Min Hua was not a statutory supervisor. At most, she appears to have been a type of lead person among the hand sewers. While the evidence is somewhat sparse, there is enough for me to find that, like Margaret and Ah Tang, Min Hua was an agent of the Respondent within the meaning of the Act. The testimony of Hui Qing Liu shows that Min Hua was the person looked to by the hand-sewers as the representative of management with respect to distribution of work and seeking time off. Accordingly, as with Margaret and Ah Tang, any statements or actions by Min Hua, which would fall within the scope of her apparent authority, are attributable to the Respondent.

C. *The Alleged Refusal to Hire or Consider for Hire*

1. Applicable Legal Standard

The General Counsel alleges and the Respondent denies that, after the Respondent closed Jen Chu, it failed and refused to hire, or consider for hire, for reasons proscribed by the Act, certain former employees of Jen Chu to positions that were available at HLS. The Board, in *FES (A Division of Thermo Power),* 331 NLRB 9 (2000) established a new test for determining the merits of such allegations. To establish a discriminatory refusal to hire, the General Counsel must first show the following:

1. that the respondent was hiring, or had concrete plans to hire, at the time of the alleged refusal to hire.
2. that the applicants had experience or training relevant to the announced or generally known requirements of the available positions, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and
3. that antiunion animus contributed to the decision not to hire the applicants.

Once the General Counsel has established these three elements of his case, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union or other protected concerted activity. If the respondent contends that the applicants were not qualified for the positions it was filling, it will bear the burden of showing that the applicants either did not possess the specific qualifications required for the position, or that others who were hired had superior qualifications. *Id.* at 12. Accord: *Wayne Erecting, Inc.,* 333 NLRB No. 149 (April 30, 2001). To establish a refusal to consider for hire, the General Counsel has the initial burden of showing the following:

1. that the respondent excluded applicants from a hiring process; and
2. that discriminatory animus contributed to the decision not to consider the applicants for employment.

Once this is established, the respondent will bear the burden of showing that it would not have considered the applicants even in the absence of their protected activity. *Id.* at 15. In adopting this test, the Board adapted the formula it first established in *Wright Line*[8] for determining motivation in cases involving discriminatory actions against current employees.[9]

Because the General Counsel is alleging that the unlawful motive behind the Respondent's conduct was the employees' participation in the filing of a lawsuit and their efforts to enlist the assistance of the Union in obtaining employment with HLS, the General Counsel must also prove the concerted nature of the employees' activity, that the activity was protected by Section 7 of the Act, that the Respondent had knowledge of the concerted nature of the employees' activity, and that the employer was motivated by the employees' Section 7 activity when it did not hire, or consider, the alleged discriminatees for employment. *Meyers Industries, Inc.,* 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB,* 835 F.2d 1481 (D.C. Cir. 1987). See also *KNTV, Inc.,*319 NLRB 447 (1995); *Kysor Industrial Corp.,* 309 NLRB 237 (1992). As with any case where an employer's motivation is at issue, circumstantial evidence may be considered in the absence of direct proof of an unlawful motive. See, e.g., *Naomi Knitting Plant,* 328 NLRB 1279 (1999).

2. Facts[10]

Zeng Guan Liu, the Charging Party, testified that he was laid off by Jen Chu in November 1999 because work was slow. About a week after his lay-off, he and Miao Qiong Chen, another sample maker who had also been laid off, returned to the factory to pick up their paychecks. When Margaret handed him the payroll documents to sign before receiving his paycheck, Liu asked for a copy of the documents because he believed that the Respondent had not paid him properly for overtime he worked. Margaret refused to give him a copy of the document. Liu then left with the document to make his own copy. When he returned with the document, Margaret gave him his paycheck. Miao Chen corroborated Liu's testimony. Miao Chen also testified that she asked for a copy of her records but that

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] *FES* involved allegations of antiunion motivation under Section 8(a)(3) of the Act. The same test would apply to allegations that an employer violated Section 8(a)(1) of the Act by refusing to hire or consider applicants because they engaged in other concerted activities protected by Section 7 of the Act. The Board has traditionally applied identical test to determine motivation under both sections of the Act. See *Wright Line,* 251 NLRB supra at 1089.

[10] All of the witnesses except for Calvin Chen testified through an interpreter. Although the interpreters did an outstanding job translating for the witnesses, the transcript does not always accurately reflect the actual testimony. In addition, the interpreters themselves had some difficulty with translation because of different dialects spoken by the witnesses and the problem translating certain legal concepts and terminology unique to our culture to another language. I have taken all of this into consideration in evaluating the testimony of the General Counsel's witnesses whom I found to be generally credible.

Margaret wouldn't give them to her after Liu took his records out of the factory. Margaret, who remains on the Respondent's payroll as an employee of HLS, did not testify.

Liu testified further that he received a call the next day from Sheng Jian Chen, one of his co-workers, relaying a message from the boss, Calvin Chen. Sheng Jian Chen corroborated this testimony. According to Sheng Jian Chen, Calvin Chen called him after Liu made a copy of his payroll records and asked Sheng Chen to tell Liu not to bring a lawsuit against him and to wait until he returned from vacation to discuss the problem. Calvin Chen also told Sheng Chen in this conversation that a lawsuit would not be beneficial to anyone. After his recollection was refreshed through leading questions, Sheng Chen recalled that Calvin Chen also said during this phone conversation that if Liu went forward with a lawsuit, "at the very end he would just close the factory down." According to Sheng Chen, the message he relayed to Liu was that the boss wanted Liu to wait until he returned from vacation to discuss the problem. Miao Chen further corroborated this testimony when she testified that Liu told her, several days later, that the boss had sent a message to him through "Little Chen".

Liu testified that, after receiving this message from Sheng Jian Chen, Calvin Chen called him directly. According to Liu, Calvin Chen told him that the floor lady, Mrs. Moi, had made a mistake and gave him the wrong message. This apparently was a reference to a conversation Liu had with Mrs. Moi in which she told him that the boss was going to change the way he was paid from an hourly rate to a piece rate. Liu explained that this is why he wanted a copy of his pay record. Mrs. Moi's "mistake" apparently was not telling Liu that the boss would make up the difference if the amount he earned under the piece rate was less than he would have under his hourly rate. Liu testified that, at the end of his phone conversation with the boss, Calvin Chen told him he could come back to work because there were a lot of samples to make.[11] Liu returned to work shortly after this phone call. Miao Qiong Chen was not recalled to work until several months later.

Calvin Chen admitted that he learned that Liu had taken his payroll records to make copies the same day this happened. He acknowledged being concerned about what Liu would do with these records. Calvin Chen denied having a telephone conversation with Sheng Chen and denied telling Sheng Chen that he would close the factory if Liu filed a lawsuit. According to Calvin Chen, it was Sheng Chen who approached him in his office at the factory, offering to mediate the dispute with Liu over the payroll records. Calvin Chen testified that he asked Sheng Chen to find out from Liu what he wanted. When Sheng Chen reported back to Calvin Chen that Liu wanted four weeks pay plus a couple thousand dollars more, Calvin rejected this proposal. According to Calvin Chen, "[Liu] tried to blackmail me and I did not --he asked for some money and then I suspect he would file a lawsuit." Calvin Chen testified that, although he was initially concerned about a lawsuit, over time it did not matter to him whether Liu filed a lawsuit or not.

Miao Qiong Chen testified that, when she returned to work, in about February, 2000, she was not permitted to return to her former work area, sitting next to Zeng Guan Liu. Instead, she was placed in front of the noisy marrowing machines in an area where the Respondent kept materials that where dusty and dirty. Her former work station next to Liu was kept empty. Hong Biao Huang, who was employed by Jen Chu since 1995 as a

[11] Liu's testimony regarding this conversation was very confusing, in part due to difficulty in translating his answers. The above recitation of the testimony is my effort to make sense out of the translation in the context of Liu's other testimony and the evidence in the record.

presser, also testified that Miao Chen's work location was changed. Huang recalled further that Miao Chen was also subjected to closer supervision by Margaret after her return and that Calvin Chen's mother was sent to sit across from Liu after his return. Huang testified further that he had two conversations with Calvin Chen regarding Liu's lay-off. In the first conversation, in late 1999 or early 2000, Huang told the boss that he should have given Liu some compensation for his time off because other employees who had not been laid-off were working overtime. According to Huang, Calvin Chen replied that he had to discuss it with his wife, that he did not want other employees to follow Liu's example. Huang testified that he spoke to Calvin Chen again, in March or April. This time, he told Calvin Chen that he (Chen) needed to talk to Liu and communicate with him. Huang recalled that Calvin Chen simply nodded his head and said, "okay". Calvin Chen did not dispute Huang's testimony about these conversations.

Liu testified that, after making a copy of his pay records, he did his own investigation and came to the conclusion that he was not being paid properly for overtime. According to Liu, he discussed this with his co-workers and, after obtaining their permission, also spoke to Linda Ma, the Union's representative, about the situation. Apparently not satisfied with the Union's response, Liu also sought assistance from another organization, referred to in the record as the Chinese Workers' Association. According to Liu, his conversations with co-workers took place during lunch and other breaks, in an area at the back of the factory near the pressers. He testified that he had conversations, at various times in March, April and May, with one to four other employees at a time, about the possibility of filing a lawsuit against their employer. These conversations were in the Fu Zhou dialect spoken by about 15 of the Respondent's employees who were from Fu Zhou province. Liu testified that on two occasions, Calvin Chen approached the group of employees and told them not to speak in Fu Zhounese. Two witnesses corroborated Liu's testimony about these workplace discussions, Xiao Dian Li and Feng Ying Jiang. Li testified that after one of these discussions, which had been observed by Margaret and Calvin Chen, Calvin Chen came over and stood by his machine, "looking very displeased." Jiang testified that, one time in March or April, Margaret called her into the office and asked Jiang what the employees had been talking about in Fu Zhounese. Jiang testified that she told Margaret that they had been discussing affairs in their hometown. According to Jiang, Margaret told her, "in future, not to discuss anything not favorable to the boss."

Calvin Chen acknowledged being aware of a group of four or five employees from Fu Zhou who "hung out together on breaks, speaking their dialect." He identified the employees in this group as Huang, Liu, Xiao Dian Li, Jin Shun Lin and Sheng Jian Chen. Calvin Chen denied knowing what they were talking about, claiming that he did not understand Fu Zhounese. He admitted instructing Margaret to tell employees not to speak Fu Zhounese and claimed he did this to avoid misunderstandings among his employees who came from many parts of China and spoke a number of dialects. Calvin Chen also testified that he had approached groups of employees he heard speaking Fu Zhounese and asked them what they were talking about and if it was something he should know or that they wanted to share with him. Calvin Chen's testimony at the hearing contradicted an affidavit he gave to the General Counsel in April 2001 in which he stated that he "believed" the employees were speaking about filing a lawsuit. Calvin Chen explained the contradiction at the hearing by testifying the "belief" he expressed when he gave his affidavit was his belief in April 2001 based on the fact that the employees had in fact filed a lawsuit after the factory closed. He insisted that, at the time he observed the employees talking in the factory, he did not know what they were discussing.

Miao Qiong Chen testified that, sometime in March or April, Mrs. Moi, the floor lady, brought her a sample to work on. After giving her the sample, Mrs. Moi sat down next to her and said that "the office" saw Miao Chen with Zeng Guan Liu in Chinatown. Mrs. Moi asked her if they were getting together to file a lawsuit against the company. Miao Chen testified that she replied, "I'm not filing a lawsuit yet." Mrs. Moi told Miao Chen that "the office" had asked her if she thought Miao Chen would sue and that she had told them she didn't believe so. According to Miao Chen, she responded to this by saying, "I am not too sure." Mrs. Moi did not testify in this proceeding.

As previously noted, the Respondent closed the Jen Chu factory at the end of May. Most of its remaining employees had been laid off by May 19 or 20. As previously discussed, several employees testified that they observed unfinished work being moved from the Jen Chu factory to the HLS factory next door within the last few weeks of their employment. Several employees testified that they inquired about working at HLS after their lay-off from Jen Chu. On or about June 1, Feng Ying Jiang and Xiao Dian Li returned to the Jen Chu factory to pick up their final paychecks. Before going to the factory, these two employees had met with Zeng Guan Liu, Miao Qiong Chen and Hong Biao Huang and agreed that Feng Ying Jiang would serve as the spokesman to ask for work. According to Jiang, she and Xiao Dian Li met with Calvin Chen in his office in the Jen Chu factory. When Jiang asked about working next door, Calvin Chen said no, because jackets were made next door and you don't know how to make jackets. Jiang then told Calvin Chen that Zeng Guan Liu and Miao Qiong Chen were sample makers and could make jackets. Calvin Chen replied, "no, no, no" and walked away, toward the HLS factory. Jiang followed him into the HLS factory. According to Jiang, she saw that the employees at HLS were making more than just jackets. She testified that she also saw several former Jen Chu employees working there, including one who had only worked at Jen Chu a short time. Xian Dian Li corroborated Feng Ying Jiang's testimony regarding this incident. Calvin Chen also admitted being approached by Jiang about June 1 and that Jiang asked for employment for herself and the other employees in the group. According to Calvin Chen, however, he told her that they would have to talk to his wife if they wanted work at HLS.

Sheng Jian Chen also inquired, separately, about working for HLS. According To Sheng Jiang Chen, he went to the Jen Chu factory two times in June. The first time was to pick up his last check and the second was to talk to Margaret about his claim for unemployment benefits that had been denied. On the latter occasion, after Margaret told him that it would not be a problem for him to collect unemployment and that she would take care of it, he asked her when he and husband and wife Yau Chai Cao and Yi Qing Chen could go back to work. Sheng Chen testified that Margaret replied, "right now, we don't have a lot of work here. When we have more work we will notify you and get you back to work." As noted previously, Margaret did not testify. Neither Sheng Jian Chen, nor Yau Chai Cao and Yi Qing Chen were ever recalled to work.

On June 7, Zeng Guan Liu, Miao Qiong Chen, Hong Biao Huang, Feng Ying Jiang and Xiao Dian Li, through their attorneys at the Asian American Legal Defense and Education Fund, filed in federal court a class action lawsuit on behalf of themselves and other employees of the Respondent alleging minimum wage and overtime violations under the Fair Labor Standards Act ("FLSA"). The lawsuit named as defendants several garment manufacturers including the Respondent and its main customer DKNY. Calvin Chen and Winnie Yeong were also named as individual defendants. On the day the suit was filed, a demonstration was held in front of Donna Karan's retail store in mid-town Manhattan. The five named plaintiffs participated in this demonstration along with representatives of the Chinese Workers' Association. There is no dispute that the demonstration was covered by

the local media.

Calvin Chen acknowledged being aware of the lawsuit and the demonstration on or about June 7. According to Calvin Chen, he had been in negotiations with the CEO of Donna Karan to acquire more work so that he could re-open Jen Chu. Calvin Chen testified that, on June 7, he received a fax from his employer association notifying him of the lawsuit and demonstration. He testified that, because his former employees held this demonstration in front of Donna Karan's store, "that's the end of it." He explained that, after this occurred, Donna Karan stopped talking to him and eventually pulled out all work from HLS. Calvin Chen testified that the Respondent has not done any work for Donna Karan since September 11, 2001. Although acknowledging that he blamed the lawsuit for the loss of Donna Karan as a customer, he also testified that the loss of this work was part of a larger trend in the industry to have more work done overseas.

Sheng Jian Chen testified that, on the day in June when he went to see Margaret about his unemployment claim and returning to work, she told him, after their conversation was finished, that the boss and his wife wanted to see him next door, i.e. in the HLS factory. Sheng Chen testified that he went next door and met with Calvin Chen and Winnie Yeong in the office of that factory. According to Sheng Chen, Calvin Chen said he wanted Sheng to help them out with one thing, i.e. convince the five people who had filed the lawsuit that the best thing would be to settle out of court. Calvin Chen then asked Sheng Chen to find out how much money it would take to settle out of court. Sheng Chen testified that he told Calvin Chen that it would be difficult to settle out of court because Calvin Chen had fired them. Calvin Chen then told Sheng Chen that if he helped Calvin Chen on this matter, he would remember Sheng Chen for the rest of his life. Sheng Chen testified that Calvin Chen also said if the matter was successfully resolved, "all of you workers could come back to work." Calvin Chen denied asking Sheng Jian Chen to help him settle the lawsuit. According to Calvin Chen, Sheng Jian Chen offered his assistance without being asked. Calvin Chen testified that he merely responded to this offer by saying, "let me know what he [Liu] wants and let me see what I can do."

Between June 29, 2000 and August 2, 2001, nine additional former employees of Jen Chu signed consent forms to join in the class action lawsuit that had been filed on June 7. The employees and the date each joined the lawsuit are as follows:

Bi Fang Chen	June 29, 2000
Yao Chai Cao	July 2, 2000
Sheng Jian Chen	July 3, 2000
Jin Shun Lin	July 9, 2000
Lin Xiu Feng	July 9, 2000
Jian Qin Zou	July 30, 2000
Lai Yee Chan	August 6, 2000
Hui Qin Lin	October 2, 2000
Yue Ming Peng	August 2, 2001

Calvin Chen admitted being aware, through his attorney, that these nine employees had joined the lawsuit. The attorneys representing the plaintiffs in the lawsuit sent a notice to the Respondent's attorney on October 3 that the first eight individuals named above had consented to opt-in to the lawsuit. It was not until August 29, 2001 that notice was sent regarding Yue Ming Peng's having joined the litigation.

Lai Yee Chan, one of Jen Chu's marrow machine operators, testified that she called the factory next door, i.e. HLS, on August 24 after learning from co-workers that there was work available there. When she called, she spoke to Jessie, the floor lady at HLS. When she asked Jessie if she had work, Jessie said that she was "hiring for a little bit over 10 sewing machine operators, but I really have to sort out the people first because some of the people are making trouble." Although Jessie testified as a witness for the Respondent, she was not asked about this conversation.

On August 30, a number of former Jen Chu employees attended a meeting at the Union's office with their Union representative, Linda, and several Union officers. Zeng Guan Liu, Sheng Jian Chen, Hong Biao Huang and Bi Fang Chen spoke up to request their jobs back. Bi Fang Chen told the Union representatives, for example, that because the two factories belonged to the same boss, the employees should be recalled to work. Liu passed around a letter for the employees to sign if they wanted their jobs back. The letter stated as follows, in English and Chinese:

> We ask the union to get our jobs back for us. The Jen Chu and the Jen Jen factory are one factory. The factories had the same boss and shared work. While Jen Chu has closed, Jen Jen is still open for business and hiring new workers. We have more seniority, why should we be laid off. The Union should get us jobs back in Jen Jen - this is our factory and we demand our jobs back.

The five named plaintiffs in the wage and hour lawsuit and the nine additional employees who joined that lawsuit, signed this letter.[12] After the meeting, Liu gave the letter to the Union representatives who told the employees that they would give it to the boss. Several employees testified that they learned shortly after the meeting, through other employees and Linda Ma, the Union representative, that the letter had been discussed with Calvin Chen. Although there was some discussion about the availability of a part-time job for one worker, no job offers materialized as a result of this letter.

Several employees testified that they saw Mrs. Moi at this meeting.[13] According to these witnesses, who were mutually corroborative, Mrs. Moi was speaking Cantonese with several employees who did not sign the letter. Lai Yee Chan, who is Cantonese, testified that she heard Mrs. Moi tell one employee that, even if she signed the letter, it would not be effective in getting her job back. Other employees testified, similarly, that they heard Mrs. Moi telling employees it would be "useless" to sign the letter. Mrs. Moi was not called as a witness to dispute this testimony. Calvin Chen denied learning anything about this meeting from Mrs. Moi. Mrs. Moi does not appear on any of the HLS payroll reports after the closure of Jen Chu.

Hui Qin Liu testified that she learned from another employee at the meeting that Min Hua, the lead hand sewer, had been trying to reach her by telephone. Hui Qin Liu had recently moved and changed phone numbers. According to Hui Qin Liu, that same day, after the Union meeting, she called Min Hua and explained why her phone number of record was not working. Min Hua said, during this phone conversation, "So you went to the Union and signed your

[12] The fifteenth alleged discriminatee, Yi Qing Chen, testified at the hearing but he neither signed the August 30 letter nor joined the lawsuit. His wife, Yao Chai Cao did sign the letter and join the lawsuit.

[13] The employees who recalled seeing Mrs. Moi at the meeting were Lai Yee Chan, Hui Qing Liu, Sheng Jian Chen, Bi Fang Chen, Hong Biao Huang, Feng Ying Jiang and Xiao Dian Li.

name?" Hui Qin Liu responded, "I signed my name because I wanted to get my job back. I did not sign my name to sue my boss."[14] Hui Qin Liu testified that Min Hua told her that the boss said that since she already signed her name, she could not come back to work. Min Hua, who remained on the HLS payroll at least through September 2001, was not called as a witness to dispute this testimony. Calvin Chen denied having any conversation with Min Hua about the Union meeting.

Calvin Chen testified that he did not see the employees' August 30 letter until sometime in 2001 when his attorney showed it to him. He claimed no knowledge of the letter or any similar petition from employees before his attorney showed him the letter. He did admit, however, that he had a conversation with Linda, the Union representative, in late August or early September, in which she told him that some Jen Chu employees met with the Union seeking jobs with HLS. He denied that Linda identified which employees had met with the Union. Neither the General Counsel, nor the Respondent, called Linda or any other Union representative to testify regarding what communications, if any, occurred between the Union and the Respondent after the August 30 meeting.

The parties entered into a stipulation with respect to the names of 22 former employees of Jen Chu. A review of the Respondent's payroll records for HLS shows that all of these individuals worked for HLS after Jen Chu closed. Each was given a new employee number when they started working for HLS. The date they started working can be determined by looking for the first payroll period in which their name appears. Because Jen Chu and HLS used the same system for assigning employee numbers, the position for which they were hired can also be determined by reference to their employee number on the HLS payroll. The payroll report for the week ending June 10, the first full week after Jen Chu closed and after Feng Yin Jiang first sought employment for herself and the other plaintiffs in the lawsuit, shows an increase in the number of persons working for HLS from 44 to 57. The number of employees receiving paychecks from HLS remained between 56 and 60 through the end of August. There were 63 employees on the payroll for the week ending September 9, the first full pay period after the August 30 Union meeting. These records establish that there were job openings at HLS after Jen Chu closed.

Calvin Chen and Winnie Yeong did not deny that there were job openings at HLS after Jen Chu closed. They conceded, and the Respondent's payroll records show, that HLS hired a number of former Jen Chu employees. The HLS payroll records show that other individuals, who had not worked for Jen Chu, were also hired by HLS after June 1. Winnie Yeong testified that she interviewed all of the employees who were hired by HLS. She claimed that she only asked them what they could do and what department they had worked in. According to Winnie Yeong, she usually did not ask applicants how long they had worked for Jen Chu because she was only concerned with whether they had the skills to do the work. Winnie Yeong denied that her husband had anything to do with her hiring decision. Calvin Chen also denied playing any role in HLS' hiring of employees after Jen Chu closed. Although Winnie Yeong conceded that she was aware of the lawsuit that had been filed against her and her husband and their companies, she testified that she "didn't think she considered that" when hiring employees for HLS. Calvin Chen, however, acknowledged that he and his wife did talk about the lawsuit, even if not in direct relation to hiring decisions.

Calvin Chen denied at the hearing that the employees who filed the lawsuit "had no hope

[14] This was the truth because Lin did not join the lawsuit until October 2, more than a month after this conversation.

of obtaining any job at HLS." He claimed that, if there were openings at HLS, he would consider these individuals for hire. This testimony is in stark contrast to a statement he gave to the General Counsel during the investigation of the charge. In an affidavit signed April 11, 2001, Calvin Chen stated, "I would not hire any of the individuals involved in the Department of Labor lawsuit because I feel betrayed by their filing the lawsuit against me." Calvin Chen attempted to explain this admission by testifying at the hearing that he was angry when he gave the affidavit because he and his wife had recently been arrested based on criminal complaints for non-payment of wages initiated by the same group of employees.[15] Calvin Chen testified further that the fifteen named discriminatees were not the only Jen Chu employees not hired by HLS. According to Calvin Chen, there were 40 former Jen Chu employees who were not offered employment by HLS. Calvin Chen asserted further that the named discriminatees were not qualified to work for HLS because HLS made jackets and these employees did not know how to make jackets. Jessie, the floor lady at HLS, contradicted Calvin Chen when she testified that HLS did not only make jackets. According to Jessie, HLS had always made pants, skirts, shirts and blouses. Calvin Chen also claimed generally that the Jen Chu employees who were hired by HLS had "special skills". He provided no specifics as to what those "special skills" were. Similarly, Winnie Yeong, who claimed to have done all the hiring for HLS, provided no specific testimony to show that the individuals hired were more qualified than the alleged discriminatees for the openings she had at HLS.

The Respondent offered into evidence a copy of a civil complaint filed in the Supreme Court of the State of New York for New York County, which is dated February 28, 2001, alleging that the Respondent, Calvin Chen, Winnie Yeong and others discriminated against several of the individuals involved in this case on the basis of ethnicity, i.e. their status as Fuzhounese.[16] This lawsuit seeks damages in the amount of $2 million. As already noted, many of these same individuals were involved in bringing criminal charges against the Chens under State Wage and Hour laws. Calvin Chen testified that he did not hold any of this against the individual employees because he believed that others, such as the Chinese Workers' Association and their lawyers, were instigating the employees to bring these legal actions against him and his wife and their company. The Respondent's counsel also attempted to show through some of the witnesses that the Chinese Workers' Association was a labor organization competing with the Union to represent the Respondent's employees. While several of the witnesses admitted that they had joined the Association after they were terminated by the Respondent, there is no evidence that would show that the Association "exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Other than evidence suggesting that the association assisted the Charging Party and other former employees with their legal disputes, there is no evidence in the record regarding the Association itself.

3. Analysis

The evidence in the record, summarized above, establishes that certain employees of

[15] The Criminal Information, in lieu of an indictment, which led to the arrest was filed by an investigator for the State of New York Department of Law alleging criminal violations of State Wage and Hour Law based on sworn depositions provided by alleged discriminatees Lai Yee Chan, Jin Shun Lin, Sheng Jian Chen, Hui Qin Liu, Feng Ying Jiang, Xiao Dian Li, and Zeng Guan Liu, on March 29, 2001.

[16] The plaintiffs in that lawsuit are Bi Fang Chen, Yi Qing Chen, Yao Chai Cao, Sheng Jian Chen, Xiu Feng Lin, Jin Shun Lin, Zeng Guan Liu, Feng Ying Jiang, Xiao Dian Li, Hong Biao Huang, Jian Qin Zou and Hiu Qing Liu.

the Respondent engaged in concerted activities on the following occasions:

1. When the Charging Party and Miao Qiong Chen went to see Margaret in late 1999 and asked for copies of their pay records.
2. When the Fu Zhou employees met during breaks at work in February, March and April to discuss their concerns about pay and the possibility of filing a lawsuit.
3. On June 1 when Feng Ying Jiang sought employment at HLS on behalf of herself and Zeng Guan Liu, Miao Qiong Chen, Hong Biao Huang and Xiao Dian Li.
4. On June 7 when these five employees, through their attorneys, filed a class action lawsuit under the FLSA.
5. In late June when Sheng Jian Chen sought employment on behalf of himself and Yao Chai Cao and Yi Qing Chen.
6. On August 30 when fourteen employees signed a letter seeking the assistance of the Union in obtaining employment with HLS.

These concerted activities were clearly protected by Section 7 of the Act. Liu and Miao Chen's request for their pay records, the subsequent conversations at work and the filing of the lawsuit were all engaged in for the purpose of securing the employees' rights under other statutes regarding wages and overtime. The Board and courts have long recognized that such activity is entitled to the Act's protection. See *Salt River Valley Water Users' Assn. V. NLRB,* 206 F.2d 325, 328 (9th Cir. 1953). The Board has held, in particular, that the filing of a civil action by a group of employees aimed at vindicating their legal rights is protected activity unless done with malice or in bad faith. *Trinity Trucking & Materials Corp.,* 221 NLRB 364, 365 (1975), supplemented by 227 NLRB 792 (1977), enfd. 567 F.2d 391 (7th Cir. 1977). Accord: *Le Madri Restaurant,* 331 NLRB 269 (2000). Although the Respondent made much of the fact that the employees filed several lawsuits and initiated criminal actions against the Respondent and its owners, the Respondent offered no evidence to show that the employees here acted with malice or in bad faith in filing the FLSA lawsuit. I note initially that the discrimination lawsuit and the criminal information were filed in 2001, well after the Respondent had failed and refused to hire the plaintiffs and complainants in those actions and after the instant charge had been filed. The Respondent offered no evidence that any of the legal actions pursued by the employees were groundless. The testimony of the General Counsel's witnesses indicates, on the contrary, that they had a reasonable basis for filing the lawsuits and pursuing criminal charges. Moreover, even assuming these legal actions lacked merit, the Board has held that is no basis for finding bad faith. *Mojave Elec. Co-Op, Inc. v. NLRB,* 206 F.3d 1183, 1189 D.C. Cir. 2000); *Trinity Trucking & Materials Corp.,* supra.

The concerted efforts of employees to obtain employment with HLS after Jen Chu had closed were also clearly protected under Section 7 of the Act because the employees were not acting solely in their own individual interests but were looking out for one another. The employees' August 30 meeting with their Union representatives and the letter which emanated from that meeting constituted union activity as well as protected concerted activity.

The Respondent clearly had knowledge of the concerted nature of the employees' actions. Calvin Chen admitted being informed by Margaret when Zeng Guan Liu took his payroll records for copying in late 1999. Calvin Chen also admitted suspecting at that time that Liu did this because he was planning to file a lawsuit. Although Calvin Chen did not admit knowledge of Miao Qiong Chen's involvement in this episode, Margaret clearly was

aware of it and her knowledge may be imputed to the Respondent because she acted as its agent in dealing with the employees on payroll matters. Calvin Chen also admitted being aware, before Jen Chu closed, that a group of employees from Fu Zhou hung out together and spoke among themselves at work in their dialect. He acknowledged that Zeng Guan Liu was one of these employees. Although Calvin Chen denied knowing what the employees were talking about, he previously admitted, in a sworn statement, that he suspected they were discussing the filing of a lawsuit. I found Calvin Chen's attempt at the hearing to "explain" this prior statement not credible. He clearly had enough information at the time to be suspicious of Liu's conversations with other workers. Moreover, Margaret questioned one of these employees, Feng Ying Jiang, about these Fu Zhounese discussions and warned her that she should not be discussing anything unfavorable to the boss. Because of Margaret's apparent authority to speak and act for Calvin Chen in his absence and her role in administering payroll, the Respondent is liable for Margaret's interrogation and warning of Jiang. Margaret's conversation with Jiang is further evidence that the Respondent at least suspected that the employees were engaged in protected concerted activity. Further evidence of the Respondent's knowledge can be found in Mrs. Moi's conversation with Miao Qiong Chen in which she indicated that the Respondent suspected that Chen and Liu were filing a lawsuit because they had been seen together in Chinatown. Because the Respondent has admitted that Mrs. Moi was a supervisor at the time, her statements are attributable to the Respondent.

Based on the above, I find that, when Feng Ying Jiang and Xiao Dian Li met with Calvin Chen on June 1 and Jiang asked for jobs with HLS for themselves and Liu, Huang and Miao Chen, the Respondent at least suspected that these five employees were acting in concert and that they were in the process of pursuing legal action against the Respondent over issues regarding their wages and overtime. These suspicions were confirmed on June 7 when Calvin Chen learned, through his employer association, that these five employees were plaintiffs in a class action under FLSA against not only the Respondent, but its customer DKNY. At about the same time, Calvin Chen admittedly learned through the media that these same employees had participated in a demonstration at that customer's retail store. According to Calvin Chen, it was these events that brought to a halt his efforts to win back work from DKNY so that he could re-open Jen Chu.

The evidence in the record, in particular HLS' payroll records, show that the Respondent was hiring for jobs at HLS in early June, when the five employees sought employment before filing their lawsuit. Although the Respondent attempted to show that the jobs available at HLS differed from the work the five alleged discriminatees did at Jen Chu, I find that the General Counsel has met his initial burden of showing that sample makers Liu and Miao Chen, sewing machine operators Jiang and Li and presser/floorperson Huang had "experience or training relevant to the generally known requirements of the available positions" at HLS. *FES,* supra. The Respondent's payroll report for the week ending June 10 shows that four sewing machine operators were added to the payroll that week, all former Jen Chu employees.[17] The testimony in the record shows that the position of sample maker requires at least the skills of a sewing machine operator. The June 10 payroll report also shows that a floor person with an employee number in the same group as Huang (6000s) was added to the HLS payroll during that week.[18] HLS also added a special machine operator and two hand finishers, including Min Hua, who had worked at Jen Chu

[17] The four new operators were: Hsiu Chun Huang Chang, Hui Zhen Chen, Mei Kuen Chan and Lai Ling Chiu.

[18] Shui Ping Chong, also a former Jen Chu employee.

during this pay period. Subsequent payroll reports show that five additional employees were added to the HLS payroll in July and August to fill similar positions.[19]

I find further that animus toward these five employees' protected concerted activity contributed to the Respondent's failure to hire, or even consider, them for the openings that were available at HLS. Calvin Chen admitted, in a pre-trial affidavit, that he would not "hire any of the individuals involved in the Department of Labor lawsuit because [he felt] betrayed by their filing the lawsuit against [him]." His animus toward this group of employees was further demonstrated by his testimony that the lawsuit and the demonstration in front of Donna Karan's store put an end to any chance that DKNY would send more work to the Respondent. It is apparent that he blamed these employees and their protected activity for his company's difficulty in obtaining work.

The Respondent offered virtually no evidence to rebut the General Counsel's case. Although Calvin Chen claimed that the Jen Chu employees hired for the openings at HLS had "special skills", he offered no specifics. His claim that the five alleged discriminatees did not know how to make jackets is lacking in credibility in light of Calvin Chen's admission that he does not know how to sew and knows very little about the production side of the business. Moreover, Jessie contradicted his testimony that HLS was only making jackets at the time. Finally, I do not credit the testimony of Calvin Chen and his wife that she did all the hiring for HLS and he had no involvement in the decision regarding whom to hire. Calvin Chen's denial of any involvement is internally inconsistent with his testimony regarding the relative skills of the individuals who were hired. Even assuming Winnie Yeong did the hiring, she did not provide any explanation for not hiring any of the five employees who sought employment on June 1. Accordingly, I find that the Respondent has not met its burden under *FES* of showing that it would not have hired the five named plaintiffs in the FLSA suit in the absence of protected concerted activity.[20]

Based on the above, I find that the Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint, by failing and refusing to hire, or to consider for hire, Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li and Hong Biao Huang since June 1 because they concertedly filed a lawsuit under the FLSA.

The General Counsel argues in its brief that the Respondent also failed to hire or consider for hire the nine other former Jen Chu employees who joined the lawsuit after June 7 because of their involvement in the lawsuit. This is not alleged in the complaint. The complaint only alleges that the other nine employees and Yi Qing Chen were not considered for employment or hired because they sought the assistance of the Union in

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[19] Sau King Yung, a former Jen Chu hand finisher, started working in the same position at HLS during the week ending July 8. Zi Cheng Li, classified as a presser with Jen Chu, joined the HLS payroll as a floorperson during the week ending July 29. Three more sewing machine operators, including two who had worked at Jen Chu (Yuet Sheung Wong and Shu Fang Zhang) were added to the HLS payroll in the week ending August 26.

[20] I reject the Respondent's contention that the employees' activities were an attempt to gain recognition by the Respondent on behalf of a rival labor organization. See *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50 (1975). The Respondent offered no evidence that the hiring of these five employees would have undermined its collective-bargaining obligations to the Union. The Respondent did not even attempt to show that the Jen Chu employees it did hire had greater seniority or some other contractual right superior to the alleged discriminatees.

getting their jobs back on August 30. In any event, the evidence in the record does not support the General Counsel's new contention. There is no evidence that the Respondent was even aware that any of the nine had "opted in" to the lawsuit before October 3 at the earliest, i.e. the date the plaintiffs attorneys sent formal notice to the Respondent's attorneys that eight of the former employees had signed consent forms. Thus, the Respondent could not have been motivated by this activity in failing to hire or consider the nine other alleged discriminatees.

There is no dispute that fourteen former Jen Chu employees signed a letter at the Union's office on August 30 seeking the Union's help in getting their jobs back with the Respondent. The General Counsel alleges that the Respondent failed and refused to hire, or consider for hire, these fourteen employees in violation of Section 8(a)(1) and (3).[21] Calvin Chen denied any knowledge of this letter until sometime in 2001. He did admit that the Union representative, Linda, told him in late August or early September that some Jen Chu employees met with the Union seeking jobs with HLS. He claimed that Linda did not identify which employees had made such a request. However, the Respondent already was on notice as to the identity of several of these employees. Thus, Sheng Jian Chen sought employment on behalf of himself and Yao Chai Cao and Yi Qing Chen in a conversation with Margaret in late June and Lai Yee Chan asked Jessie if HLS had any work in a telephone conversation on August 24. Because Jessie is an admitted supervisor and Margaret an agent of the Respondent, their knowledge is imputed to the Respondent. Based on these earlier requests, the Respondent may have suspected that these employees had gone to the Union for help in finding employment with HLS.

The General Counsel argues that knowledge of the letter should be imputed to the Respondent because Mrs. Moi, an admitted supervisor, attended the meeting and dissuaded employees from signing the letter. However, it does not appear that Mrs. Moi was still employed by the Respondent at the time of the meeting. As previously noted, her Chinese name does not appear on any HLS payroll report after Jen Chu closed. If she was no longer employed by the Respondent in a supervisory capacity on the date of the meeting, she could not be acting as its agent and whatever knowledge she had could not be imputed to the Respondent.

The General Counsel also relies on the statements of Min Hua to Hui Qin Liu shortly after the meeting to establish the Respondent's knowledge. Min Hua indicated in this conversation that she already knew that Liu had signed the letter. She then told Liu that the boss said Liu could not come back to work because she signed her name. I have already found that Min Hua, as the lead hand sewer, was an agent of the Respondent. Because Min Hua was speaking to Hui Qin Liu regarding the availability of work in that department, Hui Qin Liu could reasonably believe that Min Hua was speaking for management when she made this statement. I find that Min Hua's knowledge that Hui Qin Liu had attended the meeting and signed the letter may be imputed to the Respondent. Min Hua's statement also establishes the Respondent's animus toward this type of activity by employees. Further evidence of the Respondent's animus may be found in the statement Jessie, HLS' admitted supervisor, made to Lai Yee Chan when she inquired about work on August 24, before the meeting. Jessie told Lai Yee Chan that she was hiring operators but had to sort out the employees first because "some of the people are making trouble."

[21] As previously noted, the five former Jen Chu employees who filed the FLSA lawsuit are included in this group as well.

The Respondent's payroll records for HLS show several additions to the payroll after the August 30 meeting. Two sewing machine operators were added during the week ending September 2, one who had previously worked for Jen Chu (Suk Fong Wong) and another (Elaine Lee) who had not. Two other former Jen Chu operators were added during the weeks ending September 9 (Suk Fong Liu) and September 30 (Shu Hua Jin). These records also show that Wai Lin Kwok, who had not previously worked for Jen Chu, was hired as a sewing machine operator during the week ending November 1 and that Choi Kwai Wong, who had worked for Jen Chu in an office or supervisory classification, was added to the HLS payroll as a presser during the week ending November 11. This evidence establishes that the Respondent was hiring for positions at HLS at the time of the August 30 meeting and after.

The General Counsel argues that Calvin Chen's claimed lack of knowledge as to the identity of the employees who signed the letter should be discredited or, in the alternative, that knowledge should be inferred from the circumstances. See, e.g., *Greco & Haines, Inc.,* 306 NLRB 634 (1992); *BMD Sportswear Corp.,* 283 NLRB 142, 142-143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988). Having considered the evidence in the record and Calvin Chen's demeanor on the witness stand, I can not credit his denial regarding this aspect of the case. As previously noted, Calvin Chen was not a generally credible witness, frequently contradicting prior sworn statements he provided to the General Counsel. In addition, the statements of his agents Margaret and Min Hua demonstrate that the Respondent had detailed knowledge regarding the activities of the employees who were "making trouble." Moreover, it is unlikely that Linda, the Union representative, would have told him about the meeting employees had with the Union and their request for jobs with HLS without sharing with him the letter the employees had given her at the meeting. Accordingly, I find that the Respondent was aware, shortly after August 30, that the fourteen employees whose signatures appear on the letter had sought the assistance of the Union in getting their jobs back.

I find that the General Counsel has met his burden of showing that the Respondent was hiring for positions at HLS and that the Respondent excluded the fourteen employees who signed the August 30 letter from the hiring process for discriminatory reasons. I rely in particular on Jesse's statement to an applicant that the Respondent was "sorting out" the troublemakers before adding more sewing machine operators and on Min Hua's statement to another applicant that the boss said she could not come back to work because she had signed the letter. I also find, for the reasons previously stated, that the General Counsel has established that at least some of the alleged discriminatees had experience or training relevant to the positions being filled by HLS and would have been hired in the absence of union and protected concerted activity. Thus, Xiu Feng Lin and Jin Shun Lin had worked for Jen Chu as sewing machine operators; Bi Fang Chen had been a marrower and special machine operator; Lai Yee Chan, Yao Chai Cao and Jian Qin Zou had worked as marrowers[22]; and Sheng Jian Chen was a presser.[23] Accordingly, I find that the General

[22] It appears from the testimony of the witnesses that a marrow machine is a type of sewing machine used to bind the edge of garments. It is unclear whether the degree of skill required to perform this work is similar or different from that of a sewing machine operator. That determination can be left to the compliance stage of this proceeding.

[23] Hui Qing Liu had worked for Jen Chu as a hand finisher. It is unclear from the record whether these skills were relevant to any of the openings available at HLS after August 30. There is no evidence in the record regarding Yue Ming Peng's experience or training other than the fact his employee number at Jen Chu fell under the category of "floor person/helper".

Counsel has met his initial burden under *FES.*

The Respondent offered essentially no evidence to rebut the General Counsel's case. Thus, it offered no evidence that the persons hired to fill positions at HLS after August 30 were more qualified than any of the alleged discriminatees. The Respondent instead relied on the fact that other former Jen Chu employees had not been hired as well. That fact is insufficient to rebut the evidence showing that the Respondent consciously excluded the alleged discriminatees from consideration because of their protected concerted and union activities.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (3) of the Act, as alleged, since August 30, by failing and refusing to hire, or consider for hire, the 14 employees who signed the August 30 letter seeking the Union's assistance in getting their jobs back. I shall recommend dismissal of the complaint with respect to the allegation that the Respondent failed and refused to hire, or consider for hire, Yi Qing Chen in violation of the Act. Because Yi Qing Chen neither joined the lawsuit nor signed the letter, there is no evidence that he engaged in any concerted activity protected by the Act, or that the Respondent would have been on notice that he was engaged in such activities.

Conclusions of Law

1. By failing and refusing to hire, or to consider for hire, Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li and Hong Biao Huang since June 1 because they concertedly filed a lawsuit under the FLSA , the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By failing and refusing to hire, or consider for hire, the 14 employees who signed the August 30 letter seeking the Union's assistance in getting their jobs back, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. The Respondent did not violate Section 8(a)(1) or (3) or any other provision of the Act by failing and refusing to hire, or consider for hire, Yi Qing Chen.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In *FES,* the Board held that the appropriate remedy for a refusal to hire violation would include an order requiring the respondent to offer those applicants unlawfully denied employment immediate instatement to the positions to which they had applied, or if those positions no longer existed, to substantially equivalent positions, and to make them whole for any wages and benefits lost as a result of the unlawful refusal to hire them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). *FES,* 331 NLRB supra at 12. The Board held further, in *FES,* that where the number of applicants unlawfully denied employment exceeds the number of positions that were available, a subsequent compliance proceeding may be used to determine which of the applicants would have been hired. *Id*. at 14. An appropriate remedy for a refusal to consider violation, according to the Board, would include an order to place the discriminatees in

the position they would have been in, absent the discrimination against them, and to consider them for openings, in accord with non-discriminatory criteria. This remedy would require the respondent to notify the discriminatees, the Charging Party and the Regional Director of any future openings in positions for which they had applied or any substantially equivalent positions. The intent of such a remedial order is to put the discriminatees in the pool of candidates for any openings that arise after the Respondent's unlawful refusal to consider them. *Id*. at 15.

The evidence described above establishes that there were more than enough openings available on and after June 1 for the Respondent to have hired Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li, and Hong Biao Huang. Accordingly, I shall recommend that Liu, Chen, Jiang and Li be offered instatement to the four sewing machine operator positions and Huang to the floor person position that were filled during the week ending June 10 and that they be made whole based on the assumption they would have been hired for these positions. The record shows that the Respondent filled six sewing machine operator and one presser position after August 30. Thus, there were not enough openings for the Respondent to have hired all of the remaining nine discriminates who signed the August 30 letter. Accordingly, I shall recommend that a determination as to which of these nine would have been hired to fill the available openings be left for compliance. Backpay will be determined based on which of the remaining nine discriminates are entitled to instatement to the positions filled after August 30. I shall recommend further that any discriminatees not offered instatement following the compliance determination be placed in the pool of candidates for any openings that arise in the future and that the Regional Director, the Charging Party and any discriminatees not offered employment as a result of this order be notified when such openings arise.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, HLS Fashions, Inc. and Jen Chu Apparel, Inc., a single integrated enterprise, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire, or to consider for hire, applicants for employment because they have concertedly filed a lawsuit under the FLSA or have engaged in other concerted activities protected by the Act.

(b) Failing and refusing to hire, or consider for hire, applicants for employment because they have sought assistance from UNITE, Local 89-22-1, or any other labor organization, in obtaining employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li, and Hong Biao Huang full instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li and Hong Biao Huang whole for any loss of earnings and other benefits suffered as a result of the unlawful refusal to hire them, in the manner set forth in the remedy section of the decision.

(c) Offer seven of the following employees, to be determined, full instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed:

Yao Chai Cao	Jin Shun Lin
Lai Yee Chan	Hui Qin Liu
Bi Fang Chen	Yue Ming Peng
Sheng Jian Chen	Jian Qin Zou
Lin Xiu Feng	

(d) Make whole those employee who are offered instatement for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(e) Notify the Regional Director, the Charging Party and any of the above employees not offered instatement when any openings in positions to which they applied, or any substantially equivalent positions, arise and consider those employees, in accord with non-discriminatory criteria, for such openings.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in New York, New York copies of the attached notice marked "Appendix."[25] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent

[25] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

at any time since June 1, 2000.

(h) Within 14 days after service by the Region, mail a copy of the attached notice marked "Appendix"[26] to all nonsupervisory employees who were employed by the Respondent at its Jen Chu facility during calendar year 2000. The notice shall be mailed to the last known address of each of the employees after being signed by the Respondent's authorized representative.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

Michael A. Marcionese
Administrative Law Judge

[26] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "MAILED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "MAILED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to hire, or to consider for hire, applicants for employment because they have concertedly filed a lawsuit against us, or because they have sought assistance from UNITE, Local 89-22-1, or any other labor organization, in obtaining employment or because they have engaged in other concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li, and Hong Biao Huang full instatement to jobs for which they applied or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days of a determination, offer seven of the following employees, to be determined, full instatement to jobs for which they applied or substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed:

Yao Chai Cao
Lai Yee Chan
Bi Fang Chen
Sheng Jian Chen
Lin Xiu Feng
Jin Shun Lin
Hui Qin Liu
Yue Ming Peng
Jian Qin Zou

WE WILL make Zeng Guan Liu, Miao Qiong Chen, Feng Ying Jiang, Xiao Dian Li, Hong Biao Huang, and the other seven employees who are offered instatement, whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest.

WE WILL notify the Regional Director, the Charging Party and any of the above employees not offered instatement when any openings in positions to which they applied, or any substantially equivalent positions, arise and consider those employees, in accord with non-discriminatory criteria, for such openings.

HLS Fashions, Inc. and
Jen Chu Apparel, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

26 Federal Plaza, Federal Building, Room 3614, New York, NY 10278-0104

(212) 264-0300, Hours: 8:45 a.m. to 5:15 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (212) 264-0346.